IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

APPEAL NO.400 OF 1997
IN
NOTICE OF MOTION NO.1044 OF 1997
IN
SUIT NO.1257 OF 1989

1. V.Pankajakshi Vasudevan,
adult, Occupation-Housewife,
Indian Inhabitant of Bombay.

2. Anita M.K.Vasudevan,
adult, occupation Service.

3. Ajit K. Vasudevan,
adult, occupation-Service.

4. Sangeeta M.K. Vasudevan,
adult, Occupation: Household.

5. Harish M.K. Vasudevan, .. Appellants
adult, Occupation : Student. (Orig.Plaintiffs)

All the plaintiffs being
Indian Inhabitants and heirs
and legal representatives of
one M.K.Vasudevan (since
deceased) residing at Netaji
Baug, Opp.API Ltd., Lal
Bahadur Shastri Marg, Bhandup,
Bombay-400 078.

v/s.

Jayant J. Patwardhan,
Adult, occupation: Business,
Indian Inhabitant, residing at
Seeta Ashram Bldg., Near Mahagiri
Masjid, Thane (West). .. Respondent
(Orig.Defendant)

Mr.A.A.Verma i/by M/s.Rustomji & Ginwala for the appellants.

CORAM : R.M.LODHA AND
P.V.KAKADE, JJ.

DATED : 2nd December, 2005

ORAL JUDGMENT (Per R.M.Lodha, J.)

Heard Mr.A.A.Verma, the learned counsel for the appellants.

2. The original plaintiffs are in appeal. Their suit came to be dismissed for want of prosecution on 16th April, 1993. The notice of motion was taken out by the plaintiffs on 31st March, 1997 for setting aside the order dated 16th April, 1993 and restoration of the suit. The said notice of motion was dismissed by the learned motion Judge on April 4, 1997. It is this order which is the subject matter of the appeal.

3. The learned counsel for the appellants invited our attention to the affidavit of the advocate Shri Arun Vasudeo Vaidya in support of his submission that there was bonafide reason on the part of the plaintiffs' advocate in not appearing before the court on 16.4.1993 and that delay in taking out the notice of motion for restoration is explained by sufficient cause.

4. The suit was filed in the year 1989 and for more than three years no steps were taken in serving the writ of summons on the defendant. Then the praecipe was taken out by the plaintiffs in the month of February, 1993 for permission to serve the writ of summons but in that regard also, no further steps were taken. The suit was listed before the trial Judge on 23.3.1993. Nobody appeared for the plaintiffs on that day. The

matter was then adjourned to 2nd April, 1993. The plaintiffs' advocate did not appear nor anybody appeared on behalf of the plaintiffs. The matter was then adjourned to 16th April, 1993. On that day also, nobody appeared for the plaintiffs. The trial Judge in the circumstances was constrained to dismiss the suit for want of prosecution and in default. For a period of about four years, nothing was done in this regard by the plaintiffs and on 31st March, 1997, the notice of motion was taken out for setting aside the order dated 16th April, 1993; restoration of the suit and for condonation of delay.

5. In support of the notice of motion, plaintiff No.5- Harish M.K. Vasudevan filed his affidavit. It is stated that though the suit was filed on 2nd December, 1988; the plaint was admitted on 21st April, 1989. The plaintiffs engaged Shri A.B.Vaidya as their advocate. The plaintiffs were regularly following up the matter with Advocate A.B.Vaidya but they were informed by him that it would take few years for the suit to come up for hearing. In the month of March, 1997, the affiant approached the advocate for finding out the position of the suit. The advocate referred him to his clerk K.D.Sawant. The clerk told him that the suit had been dismissed on 16th April, 1993 for want of prosecution and in default. He then

contacted his advocate who confirmed that the suit stood dismissed on 16th April, 1993 but assured him not to worry as a praecipe has been filed for restoration of the suit. In the affidavit he further stated that he was not satisfied with the Advocate A.B.Vaidya and took the papers back from him and then engaged new advocate and took out the notice of motion.

6. The affidavit filed by Advocate A.B.Vaidya shows that the praecipe was taken out for permission to writ of summons in the month of February, 1993. He stated that for a period of one and half year from February, 1993, he was hit by domestic and family difficulties. His son got ill and he had to run after the doctors. Then his mother died. Advocate A.B.Vaidya also stated in his affidavit that though the suit was posted on 23.3.1993, 2.4.1993 and 16.4.1993, none of the dates he could appear for the reasons of illness of his son. Then the brief papers were not traceable and he could make an application for restoration on 16.2.1996.

7. None of the affidavits in support of notice of motion makes out a good cause for non-appearance on 16.4.1993 and sufficient cause for condonation of delay of about four years. As already indicated above, the plaint was admitted in the

month of April, 1989 but for almost four years, no steps were taken in service of writ of summons on the defendants. The plaintiff No.5 has sought to pass on buck to the advocate. He states that he has been regularly following up the matter with his advocate. If it was so, obviously, he would have been informed by his advocate immediately after the dismissal of the suit but it is only in the month of March, 1997, according to him, he came to know about the dismissal of the suit when he approached his advocate. His affidavit hardly inspires confidence. As regards the affidavit of Advocate Arun Vasudeo Vaidya, we find that the said affidavit also cannot be accepted. It is highly unbelievable that from the month of February, 1993 for about year and half he was not attending the court because of the illness of his son and the death of his mother. Even if it is assumed that for a period of year and half from February, 1993 due to domestic and family difficulties, the said advocate was not able to attend the court, then also by the end of the year 1994, he could have made an application for restoration. His statement in the affidavit that the suit papers were not traceable and he could make an application for restoration only on 16.2.1996 (factually incorrect as the application is made on 31.03.1997) after his clerk took search of record and proceedings hardly merits any

acceptance.

8. The facts that have come on record demonstrate clear negligence on the part of the plaintiffs. Long delay of four years in making the application for restoration is not sufficiently explained. In the circumstances, rejection of notice of motion by the learned motion Judge cannot be faulted.

9. Appeal has no merit and is dismissed with no order as to costs.

(R.M.LODHA, J.)

(P.V.KAKADE, J.)